Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GREGORY FREELAND, et. al.,

Petitioners,

v.

HARLEY-DAVIDSON, INC., et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred by not reversing the district court's grant of summary judgment on Plaintiffs' claim that the Union violated its duty of fair representation, where the union president, without disclosure of the fact that his interests conflicted with other union members, negotiated a settlement of grievances which resulted in his collecting $18,000 in back pay benefits, while other union members that he represented were denied benefits.

II. Whether the Court of Appeals erred by not reversing the district court's grant of summary judgment on Plaintiffs' claim that the Company breached the terms of the collective bargaining agreement, where many employees filed grievances against the Company's use of a testing

requirement and the union president then negotiated in bad faith to settle those grievances so as to maximize his own personal gain at the expense of other union members.

LIST OF PARTIES

I. PETITIONERS: GREGORY FREELAND, TIM PARRILL, KENNETH SNOW, JOHN BRENNER, TIM HOCKENSMITH, WILLIE WALKER, JEFFREY KING, DWAYNE R. WILDESIN, THOMAS W. SPEELMAN, SUSAN A. NELSON, DENNIS W. LITTLE, LUZ TORRES, SALLY KNAPP, KATHRYN WILLIAMS, BEVERLY HALL, MARY GADDIST, KEVIN BEIGEL, JOSEPH W. SMALLWOOD, WINIFRED L. DAWSON, JOSE MALDONADO, DONALD E. ELLIOTT, DALE HAINES, JESSICA S. WISOTZKEY, STEVEN E. HOSKINS, ANDREW J. BEARD, LLOYD L. McELHENNY, DAVID GRAHAM, WILLIAM PADILLA, and MANUEL RAMOS.

II. RESPONDENTS: HARLEY DAVIDSON, INC. and TYSON LODGE NO. 175, DISTRICT LODGE NO. 98, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GREGORY FREELAND, et. al.,

Petitioners,

v.

HARLEY-DAVIDSON, INC., et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 17, 1994.

OPINIONS BELOW

The opinions of the Court of Appeals, whose judgment is herein sought to be reviewed, and which is reprinted in the Appendix to this petition, pp. 1-2, was not reported. The prior opinion of the United States District Court for the Middle District of Pennsylvania, also reprinted in the Appendix at pp. 5-23, was not reported.

JURISDICTION

The judgment of the Court of Appeals below (App. pp. 1-2) was entered on March 17, 1994. A Petition for Rehearing was timely filed by Appellants. On April 15, 1994, the Court of Appeals denied the Petition for Rehearing (App. pp. 3-4). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, which, in

pertinent part, provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States . . . .

STATEMENT OF THE CASE

This case involves a true and actual conflict of interest by a union president who had to make conflicting choices, some of which benefitted himself over the members he was representing in the settlement of union grievances. The district court determined that the settlement as negotiated was rational.

This appeal is taken because it is not fair for the Labor Management Relations Act to permit representation by union officials who have true conflicts of interest with the very members they are supposed to be representing.

This action for damages was filed by 29 union employees of Harley-Davidson York alleging a violation of the Union's duty of fair representation and a breach of the collective bargaining agreement by the Company, pursuant to § 301 of the Labor Management Relations Act. Plaintiffs' also alleged causes of action for

conspiracy and collusion under state law.

The heart of Petitioners' case involves a claim that Harry Smith, as Union president, breached his duty of fair representation by negotiating the settlement of his own individual grievances to the prejudice of Plaintiffs who had filed similar grievances relating to the Company's outsourcing and use of a new testing requirement. Harry Smith never disclosed to the members he was representing that he had filed grievances and that the settlement as proposed would result in his receiving a large backpay award. In effect, Harry Smith cheated the members he was supposed to be representing out of benefits because of his own self-interest.

For one year, commencing on January 25, 1992, Harry Smith was President of the Union local, Tyson Lodge No. 175. When Mr. Smith took office, he had at least six (6) personal grievances that were pending determination. There were approximately 2000 grievances pending between the Union and the Company.

When Harry Smith left office, he had received $21,408.30 in personal grievance payments. The Company received a reduced grievance backlog that fell from 2000 to 13 or 14. Most of the Plaintiffs Harry Smith was representing got little or nothing.

The Union shop committee, headed by prior Union President Hopwood, was known by the Company to negotiate grievances individually on their own merits. At the conclusion of Mr. Hopwood's term, it appeared that a great many grievances would have to be arbitrated.

In April, 1991, the Company posted job openings for the new paint shop. The new positions required satisfactory completion of a test and one year's prior experience before an applicant would be awarded a job. Numerous individuals filed grievances arising out of the new paint shop job postings including eighteen of the Plaintiffs and Harry Smith. In addition, the Union, under President Hopwood, filed a number of general grievances arising out of the new paint shop job postings.

Harry Smith became union president in January 1992 and began negotiating with the Company to resolve all of the pending grievances, including his own. The Company knew that Harry Smith was negotiating his own personal grievances with them at the time.

For the painter Plaintiffs to prevail on their grievances, only the testing requirement had to be eliminated. For Harry Smith to prevail, testing had to be eliminated and the AAT job description had to be changed to eliminate the Class A production painting experience requirement. In addition, the settlement favored Harry Smith at the expense of other members because of the use of "refused overtime" to reduce potential backpay amounts. Many of the plaintiffs worked in the paint shop where work was available seven days a week for 10 hours a day. It was not possible for these people to work all the hours offered to them which resulted in their having a lot of refused overtime. Harry Smith did not work in the paint shop and therefore did not have a large amount of

refused overtime. Because of the change in the job classification, Harry Smith's seniority and low refused overtime pushed the other grieving Plaintiffs out of a recovery of benefits while assuring himself of a large recovery.

In April of 1992 the Union and the Company resolved the paint shop grievances as a group rather than on an individual basis. The result of this settlement was that Harry Smith, who was not originally qualified to bid on the new job, now "qualified" for one of the new AAT paint shop jobs. He was also awarded $18,128 for back pay. This represents approximately 20 percent of the $87,526.00 paid by the Company to settle the AAT grievances.

With absolutely no prior general notice that it would be discussed, the paint shop grievance settlement was put to a vote at the April 23, 1992 Union membership meeting. Prior to the vote, Harry Smith stated that the testing requirement had been eliminated and that "13

unnamed people" would share $87,526.00 in back pay for the AAT job. Harry Smith did not explain the effect of changing the job description nor did he disclose that he had been awarded one of the AAT jobs. He did not state that he was going to be receiving $18,128.00 of the $87,526.00 settlement. The Union membership approved the settlement based upon the incomplete information provided at the meeting. Plaintiffs claim the result would have been different had all material facts been disclosed by Harry Smith.

When Plaintiffs tried to obtain detailed information concerning the settlement, neither the Union nor the Company would provide any information. Mr. Smith and the executive committee indicated that it was a "done deal" and that Plaintiffs "should be glad that they had a job."

Harry Smith never disclosed to the membership that he was negotiating the settlement of his own personal grievances. He never disclosed that he had a conflict of

interest with other members concerning whether the job description would be changed. He never disclosed that a deduction for refused overtime was a part of the settlement or that he had very little refused overtime and that many members had a substantial amount of refused overtime. Harry Smith negotiated the resolution of the pending grievances not to make fair choices between competing groups of employees, but rather to maximize his own pecuniary gain at the expense other union members.

JURISDICTION IN THE COURTS BELOW

Jurisdiction of the District Court to hear this case was predicated on 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291, as the district court's grant of summary judgment constituted a final order.

REASONS FOR GRANTING THE WRIT

The Third Circuit has not recognized that an undisclosed conflict of interest gives rise to a violation of the union's duty under § 301 of the Labor Management Relations Act. This is in conflict with statements by this Court that a union has a fiduciary duty to its members. "The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries." Air Line Pilots' Ass'n Int'l v. O'Neill, 499 U.S. 65, 74-75, 111 S.Ct. 1127, 113 L.Ed.2d 51, 62 (1991); See also Chauffeurs, Teamsters and Helpers v. Terry, 494 U.S. 558, 567-68, 108 L.Ed. 2d 519, 529 (1990).

Petitioners submit that the undisclosed conflicts of interest on the part of the union leadership in this case rise to the level of the bad faith required to find a breach of the union's duty of fair representation as outlined by this Court in Vaca v. Sipes, 386 U.S. 171, 177; 87 S.Ct. 903, 910; 17 L.Ed.2d 842 (1967).

The Court of Appeals has compounded the errors

committed by the District Court in focusing on the overall reasonableness of the settlements and in not addressing whether the conflicts of interest constituted bad faith. The court stated that "[w]e can not conclude that Smith's failure to notify other Union members of his self-interest is relevant to the question of whether the Union acted irrationally or arbitrarily in settling the grievances." (App. p. 12) This ignores the bad faith element of the test for determining whether a union has met its duty to its members.

The District Court ignored the severe conflicts of interest between Harry Smith and other Union members. While it may be true that the undisclosed conflicts of interest are not relevant "to the question of whether the Union acted irrationally or arbitrarily in settling the grievances[,]" (App. p.12) Plaintiffs submit that the undisclosed conflicts of interest are relevant to whether the Union acted in bad faith in settling the grievances as they did.

The District Court failed to address Plaintiffs' argument that the failure to provide information to union members after the settlements were approved is further circumstantial evidence of bad faith on the part of the union leadership in negotiating the settlements. The court stated that this was irrelevant to whether the settlement was reasonable or arbitrary. (App. p.17) Plaintiffs maintain, however, that the settlements were not reasonable or fair because of the Union's bad faith motivation to maximize their personal profit at the expense of other union members.

The Court of Appeals further compounded the error of the District Court in finding that there was no breach of the collective bargaining agreement by the Company because the settlements cured any breach that may have occurred. Petitioners submit that the Company's breach of the collective bargaining agreement was not remedied as a result of the settlements, because of the Union's discriminatory, bad faith actions in negotiating the

settlements to the detriment of many union members.

It is submitted that what this case boils down to is whether union officials, like any other fiduciary are subject to conflict of interest principles. It is submitted that union settlements completed by persons with undisclosed personal conflicts of interest and without the knowing consent of the union members who are being represented are prima facie made in "bad faith" regardless of the actual terms of settlement.

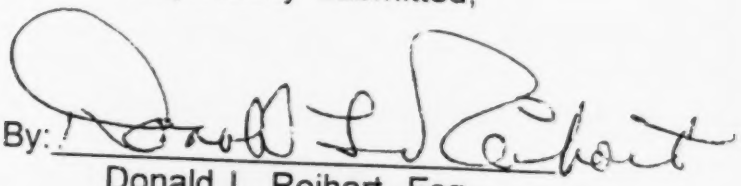
This Court has held that only union action which falls outside a wide range of reasonableness so as to be irrational or arbitrary violates the duty of fair representation. Air Line Pilots Ass'n, supra. Petitioners acknowledge that a union has discretion to favor one group of members over another, as long as the choice is made according to relevant differences between the competing groups. DeBoles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977). In this case the District Court looked only at the end result of the grievance

settlements and ignored the means at which the settlements were arrived at in concluding that there was no violation of the duty of fair representation. Petitioners ask this Court to clarify whether the actions of the union president in this case, who crafted the settlement of grievances so as to maximize his own personal gain at the expense of other members, falls outside the wide range of reasonableness allowed. Petitioners submit that the wide range of reasonableness does not extend that far, and respectfully ask this Court to reverse the judgment below.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

By: 

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Dated: July 11, 1994

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-7404

GREGORY FREELAND, TIM PARRILL, KENNETH SNOW, JOHN BRENNER, TIM HOCKENSMITH, WILLIE WALKER, JEFFREY KING, DWAYNE R. WILDESIN, THOMAS W. SPEELMAN, SUSAN A. NELSON, DENNIS W. LITTLE, LUZ TORRES, SALLY KNAPP, KATHRYN WILLIAMS, BEVERLY HALL, MARY GADDIST, KEVIN BEIGEL, JOSEPH W. SMALLWOOD, WINIFRED L. DAWSON, JOSE MALDONADO, DONALD E. ELLIOTT, DALE HAINES, JESSICA S. WISOTZKEY, STEVEN E. HOSKINS, ANDREW J. BEARD, LLOYD L. McELHENNY, DAVID GRAHAM, WILLIAM PADILLA, and MANUEL RAMOS.

Appellants

v.

HARLEY DAVIDSON, INC. and TYSON LODGE NO. 175, DISTRICT LODGE NO. 98, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.

On Appeal from the United States District Court For the Middle District of Pennsylvania (D.C. Civil Action No. 92-01256)

District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)

March 3, 1994

BEFORE: STAPLETON and SCIRICA, Circuit Judges, and VAN ANTWERPEN, District Judge*

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* Honorable Franklin S. Van Antwerpen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ORDERED AND ADJUDGED that the judgment of the district court entered July 28, 1993, be and the same is hereby affirmed.

Costs taxed against appellants.

By the Court

_____

Circuit Judge

ATTEST:

_____

P. Douglas Sisk, Clerk

DATED: MAR 17 1994

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-7404

GREGORY FREELAND, TIM PARRILL, KENNETH SNOW, JOHN BRENNER, TIM HOCKENSMITH, WILLIE WALKER, JEFFREY KING, DWAYNE R. WILDESIN, THOMAS W. SPEELMAN, SUSAN A. NELSON, DENNIS W. LITTLE, LUZ TORRES, SALLY KNAPP, KATHRYN WILLIAMS, BEVERLY HALL, MARY GADDIST, KEVIN BEIGEL, JOSEPH W. SMALLWOOD, WINIFRED L. DAWSON, JOSE MALDONADO, DONALD E. ELLIOTT, DALE HAINES, JESSICA S. WISOTZKEY, STEVEN E. HOSKINS, ANDREW J. BEARD, LLOYD L. McELHENNY, DAVID GRAHAM, WILLIAM PADILLA, and MANUEL RAMOS.

Appellants

v.

HARLEY DAVIDSON, INC. and TYSON LODGE NO. 175, DISTRICT LODGE NO. 98, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges, and VAN ANTWERPEN, District Judge*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges

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* Honorable Franklin S. Van Antwerpen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: APR 15 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY FREELAND, et. al.	:	
Plaintiffs	:	
	:	
v.	:	Civil No.
	:	1:CV-92-1256
HARLEY DAVIDSON,	:	
INC., et. al.	:	
Defendants	:	

MEMORANDUM

Pending are cross-motions for summary judgment filed by Plaintiffs and both Defendants. We exercise jurisdiction according to 28 U.S.C. § 1331. See also, 28 U.S.C. § 1337(a).

I. Facts

Plaintiffs filed this action against Harley-

Davidson, Inc., ("the Company") and the Tyson Lodge No. 175, District Lodge No. 98, International Association of Machinists and Aerospace Workers ("the Union") on September 10, 1992. The Company is a large manufacturer of motorcycles employing nearly two thousand workers at its plant in York, Pennsylvania. Plaintiffs are 29 employees of the Company who are members of the Union. Plaintiffs allege that Defendants conspired to dispose improperly of more than 1,000 employee grievances. The grievances at issue involve job postings for the Company's paint shop and allegedly improper "outsourcing" by the Company. We will offer further exploration of the facts as they become necessary to our analysis.[1]

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[1] We draw our facts, in large measure, from the statements of material facts not in dispute filed by the parties pursuant to Local Rule 401.4. We note at the outset that such statements are to include facts not in dispute. In certain instances, Plaintiffs use their statement

II. Law and Discussion

A. Standard for Summary Judgment

Summary judgment is appropriate when there remain no genuine issues as to any material facts and judgment may be entered as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Nature of Action

Plaintiffs claim that the Union violated its duty of fair representation. The duty arises from a union's role as employees' exclusive bargaining representative in issues involving "conditions of employment." 29 U.S.C. § 159(a). From that status, the Supreme Court has established that a certified union has a duty of fair representation to its members. Vaca v. Sipes, 386 U.S.

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to argue their case and proffer disputed allegations. See, e.g., ¶ 68 (alleging, without support in the record, that shop committee member Paul Quickel received a trip to Italy at the expense of the Company).

171, 177; 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967); Felice v. Sever, 985 F.2d 1221, 1226, (3d Cir. 1993). The duty acts as a counterbalance to the union's position as exclusive bargaining representative. Masy v. New Jersey Transit Rail Operations, Inc., 790 F.2d 322, 327-28 (3d Cir. 1986). The standard by which we judge a union's conduct is to ask if the challenged actions were "arbitrary, discriminatory, or in bad faith." Vaca, supra; see also, Riley v. Letter Carriers, 668 F.2d 224, 228 (3d Cir. 1981). The conduct of a union official in handling grievances is not deemed arbitrary or perfunctory when it is merely inept or negligent. Findley v. Jones Motor Freight, 639 F.2d 953, 960 n.2 (3d Cir. 1981). The United States Court of Appeals for the Sixth Circuit recently described the standard a plaintiff must meet.

> [A] union breaches its duty of fair representation only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness"

as to be irrational or arbitrary. Merely characterizing a union's actions in conclusory terms is insufficient to withstand summary judgment. Rather, to meet the burden of proof as to the union's breach of its duty of fair representation, a plaintiff must establish by substantial evidence that the union acted arbitrarily, discriminatorily, or with bad faith.

Painter v. Mazda Motor Manufacturing (USA) Corp., No. 92-1516, 1993 WL 185181 at *4 (6th Cir. May 27, 1993), quoting and citing Airline Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991).

At the same time, Plaintiffs allege that the Company, acting in concert with the Union, violated the collective bargaining agreement in violation of the Labor Management Relations Act, 29 U.S.C. § 185 et seq. The two claims, abrogation of the duty of fair representation and violation of the collective bargaining agreement, are inextricably intertwined; the sort of action presented by

Plaintiffs is known as a "hybrid" action. See Souter v. Int'l Union, U.A.W.A., 993 F.2d 595 (7th Cir. 1993). For a plaintiff to prevail in a hybrid action, he must prove his case against both the union and the company. Del Costello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983); Felice, 985 F.2d at 1226; Souter, supra, at 598. We will, then, consider in turn the claims Plaintiffs make against the Union and the Company, bearing in mind Plaintiffs' dual obligations.

C. Specific Claims

The claims against the Union mirror those against the Company. There are two areas of conduct that Plaintiffs challenge: (1) a grievance settlement concerning positions at a new company paint facility and (2) a grievance settlement regarding the Company's having contracted certain bargaining unit work to be done by others (outsourcing).

1. New Paint Shop

In October, 1991, the members of the Union elected three new officials to head the Union. Those three -- Harry Smith (president), Gordon Spangler (vice-president), and Paul Quickel (shop steward) -- took office on January 25, 1992. As the three assumed their positions, there were many grievances pending against the Company.

In 1991, the Company had opened a new painting facility and posted descriptions of three sorts of jobs that would be available there: (1) automated application technician ("AAT"), (2) finesse technicians, and (3) preparation technicians. In April, 1991, the posted 29 positions for AATs and more than 120 employees applied. Shortly thereafter, the Union and several employees filed grievances against the Company, principally challenging two of the job criteria, one that required applicants to have one year of Class A production painting experience and another that required them to take and pass a written test.

Among those who challenged the AAT selection criteria was Harry Smith, before he became Union president.[2]

There was no substantial progress in settling the paint shop grievances until March and April, 1992, after Smith assumed the Union presidency. The Company and the Union exchanged a number of proposals and finally reached an agreement in late April, 1992, subject to approval by the Union members. The parts of that settlement material to the case at bar included: (1) the elimination of the testing requirement, (2) the alteration of the experience requirement from "one year Class A production painting experience" to "one year production

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[2] After the Company posted the AAT jobs, 11 of the Plaintiffs filed grievances regarding the qualifications. After the preparation technician jobs were posted, two of the plaintiffs filed grievances. After the posting of the finesse technician jobs, eight of the plaintiffs filed grievances. See Plaintiffs' Statement of Material Facts ¶¶ 10-12 and depositions cited therein.

painting experience", (3) the addition of 16 positions on the paint line to form another shift, (4) an agreement that the 45 positions would be filled from the list of original bidders, and (5) a compromise that the Company would award backpay to all eligible employees who were rejected as not meeting the original job criteria. See Letter of Understanding of April 22, 1992 (Exh. 15 of Defendants' Joint Statement of Material Facts).

At a meeting of the Union's executive board a few days after the Letter of Understanding was signed, the board unanimously approved the paint shop settlement. See Deposition of Richard Elliott at 35, lines 21-22. The full Union membership considered the settlement at a meeting on April 23, 1992, and a large majority voted in favor of approving it. Deposition of John Brenner at 30, lines 5-9.

The Company calculated the backpay awards based upon a formula set down in the Letter of Understanding. Five Plaintiffs were deemed eligible to

receive backpay with regard to the AAT positions, although just two actually received money. Union president Smith received $18,241.87, the second largest payment. See Affidavit of A. George Sanders at ¶¶ 63-64.[3] The Company used the same formula to calculate the backpay for applicants for the other two paint shop positions.

The Company also applied the new job requirements to the list of those employees who had originally bid on any of the three types of paint shop jobs and awarded the 45 positions to the most senior employees who met the criteria. Deposition of Harry Smith at 72-73. Two employees, Plaintiff Dale Haines and Donald Elliott, held paint shop jobs based upon meeting the original criteria but were "backed out" of those positions when the Company determined that there

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[3] The only employees considered for backpay were those who had originally bid for paint shop jobs and been rejected based on "improper" criteria.

were more senior employees who met the new criteria. The change in the AAT job description also worked to the benefit of Harry Smith, as he received one of those positions.[4]

a. Union Breach of Duty of Fair Representation

Plaintiffs point to various deposition testimony as evidence that the Union violated its duty of fair representation in its handling of the paint shop grievances.

Plaintiffs argue that Harry Smith had an obligation to notify the other grievants that he had a personal interest in the outcome of the settlement. They compare the duties of a union official with the fiduciary duties of a trustee, Airline Pilots Ass'n v. O'Neill, supra, and cite state law duties owed by fiduciaries. This ignores the appropriate standard. As we have noted, the actions of the Union leadership are to be examined to determine if

[4] We concentrate,as did the parties, on the settlement as it related to the AAT positions, as most of the dispute is centered around those jobs.

they were "so far outside a 'wide range of reasonableness' as to be irrational or arbitrary." Painter, supra. Such a standard is more deferential to union action than that urged by Plaintiffs. We can not conclude that Smith's failure to notify other Union members of his self-interest is relevant to the question of whether the Union acted irrationally or arbitrarily in settling the grievances.[5] Likewise, Plaintiffs argue that the other

[5] Plaintiffs point to deposition testimony that Harry Smith told another employee that he would "get a lot of money" from filing his grievance. Deposition of Lloyd McElhenny at 52, lines 11-12. Plaintiffs ask that we infer that Smith intended to profit personally from his position as president and negotiator. A review of the testimony leads us to conclude that such an interpretation is without merit.

> Q What facts or evidence do you have that make you think Harry Smith got something he shouldn't have?

members of the Union shop committee, Gordon Spangler and Paul Quickel, did not reveal that their relatives would benefit from the settlement. Again, this has little bearing on the overall reasonableness of the settlement. To apply Plaintiffs' reasoning to its extreme, the only fair settlement would have been one in which neither Smith, Spangler,

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> A Well, just the fact that I talked to him back on the bomb line, and he said that he had something filed with -- he filed a grievance against the union about the paint department and he was going to get a lot of money.

Id. A fair inference from this exchange is that Smith simply anticipated that his grievance would be successful and that he would receive backpay. In that regard, he was no different than the other employees who bid for paint shop jobs, including several Plaintiffs. Importantly, this conversation took place before Smith was elected president of the Union. McElhenny Depo. at 53, lines 17-19.

Quickel nor any of their relatives received benefits. Such a result would be unreasonable and, in a facility in a relatively small community, impractical.[6] Additionally, Defendants point out that most of the elements of the settlements were demands made by the Union under its former officials in 1991. Deposition of George Sanders at 36, lines 1-3.

Plaintiffs also point to Smith's decision to settle grievances by issues rather than by individual arbitration. Defendants counter that individual arbitration of thousands of grievances would have caused the Union to incur thousands, or perhaps millions, of dollars in costs. We note, initially, that a number of the Plaintiffs actually benefitted from the settlement negotiated by Smith. See

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[6] Plaintiffs also charge, without reference to any evidence in the record but an unanswered deposition question, that the Company paid for Mr. Quickel to travel to Italy. As there is no support for this allegation, we will not consider it.

Sanders Aff. ¶ 79 (Plaintiffs John Brenner and Kenneth Snow received AAT positions and backpay).[7] The fact that some Union members received benefits from the settlement while others did not does not indicate that the settlement was arbitrary or unreasonable. See Chaparro-Febus, et al v. Int'l Longshoremen's Ass'n, 983 F.2d 325, 330-31 (1st Cir. 1992).

Plaintiffs also challenge the formula used to

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[7] In this sense, Plaintiffs can not claim that they share a common interest, as some benefitted from the settlement while others were "backed out" of jobs. Those who received AAT jobs complain about the backpay calculation but not the job criteria modification. Those who were backed out of jobs challenge the change in the job description that widened the pool of qualified applicants and allowed more senior employees to take their places. Given that, it is difficult to discern precisely what settlement would have satisfied all 29 plaintiffs. Union officials were truly faced with a Hobson's choice.

calculate backpay formulas. As noted, several of the Plaintiffs received significant backpay under that formula. Still, Plaintiffs imply that the equation was established to insure that Harry Smith received a large sum. We note, first, that there is no indication in the record that Plaintiffs' accusation is true. Mr. Smith testified in deposition that, while he knew the formula from the negotiations, he did not know the amount he would actually receive. Smith Depo. at 52, lines 7-14. Rather than offer any evidence that Smith did know he would receive a significant sum, Plaintiffs merely assert that "it seems incredulous that he would not know the details of the settlement." This statement is misguided in that (1) it lacks any support in the record and (2) it is not difficult to believe that Smith knew the formula yet not the specific result in his case.[8]

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[8] The only reference Plaintiffs make to the record here is the testimony of Patricia Ruppert, whose position is unidentified but who, from the context of her deposition, would seem to be a secretary or bookkeeper. Ms.

Plaintiffs further argue that Smith actually only worked three days in the AAT position, after signing an agreement that he would forfeit his backpay if he did not work at least five. Our review of the record suggests that here, as elsewhere, Plaintiffs attempt to draw untenable inferences from testimony. To support their argument that Smith worked less than five days, they point to his deposition testimony.

Q You eventually got the job, didn't you?

A Yes.

Q How long did you do it?

A I think it was four months or so.

Q Isn't it, in fact, true that you only actually

Ruppert testified that she calculated the actual backpay amounts two and a half weeks before Harry Smith presented the settlement to the Union. Assuming, arguendo, the testimony is correct, it does not suggest that the calculated numbers were communicated to Smith at any time before the meeting.

went and performed the duty of the job of an AAT for three days?

A I think it was better than that, but I can't tell you. I was full-time union president, and on weekends, I was asked to learn a robot and in the mixing room. I feel it was more than five days, but . . .

MS. LASSEN: Three days.

THE WITNESS: Three days.

BY MR. REIHART:

Q Could it have been three days?

A I guess.

Smith Depo. at 27, lines 3-18. First, Smith did not testify that he worked for only three days; rather, he admitted he was not sure and that it could have been three days. Second, and more important, the testimony and other record evidence suggests that Smith held the job for several months, although he actually worked at it for only a few days. At Harley-Davidson, as at many factories,

Union officials are allowed to retain their job classifications although they are actually performing Union work. Affidavit of Douglas Decker at ¶ 11. Hence, smith was classified as an AAT for longer than five days.

Finally, Plaintiffs argue that several Union members sought information about the settlement from Union officials and were rebuffed. Again, this assertion, even if true, is irrelevant to the question of whether the settlement was reasonable or arbitrary. Painter, supra.

In sum, as regards the paint shop grievances, Plaintiffs have cited the relevant standard and then ignored it. The thrust of their argument is that Harry Smith and relatives of other Union officers benefitted from the settlement Smith negotiated, yet Smith declined to disclose that fact to the membership before it voted overwhelmingly to approve the settlement. Assuming these assertions to be true, they do not speak to the proper standard by which this action must be judged.

b. Company Breach of Collective Bargaining Agreement

Because Plaintiffs bear the burden of proving both Union and Company improprieties in a hybrid case such as this, Del Costello, supra, and because we have found no merit to Plaintiffs' allegation that the Union breached its duty of fair representation as regards the paint shop settlements, we might choose to set aside a discussion of whether the Company breached the collective bargaining agreement as regards the paint shop. Because our conclusion as to the Company bolsters our conclusion concerning the Union, we will, however, discuss this aspect of Plaintiffs' allegations.

Although not in any sense highlighted in Plaintiffs' briefs, we discern only one point at which Plaintiffs claim the Company violated the collective bargaining agreement: when it required that applicants for AAT positions in the paint shop take a written test. We find no merit in this contention.

First, accepting Plaintiffs' description of the material facts as true, we do not conclude that there was a breach of the collective bargaining agreement when the Company required the written test. Plaintiffs rely on Article 8, § 2(C) of the collective bargaining agreement.

> The Employer may require written and practical tests to assist in determining an employee's qualification for the posted position. Results of such tests will be forwarded to the Union President prior to the awarding of the bid.

Exh. 2 to Defendants' Joint Statement of Material Facts (emphasis added). Plaintiffs interpret the highlighted language to mean that "the testing was to 'assist' in job selection and was not to be the 'sole' basis for job promotion." Assuming this interpretation to be correct, we find that there was no violation. The test results were not the sole criteria; bidders were required to have one year class A production painting experience, an ability to read technical data and written reports, and a working

knowledge of chemistry. Exh. 9 to Defendants' Joint Statement of Material Facts.

Second, assuming our first point to be in error, the violation was corrected when the settlement was reached and the Company abandoned the testing requirement. Plaintiffs can not now be heard to complain about the results of a testing requirement that was removed.

Thus, on both sides of the hybrid § 301 standard, Plaintiffs have failed to demonstrate that there are material facts in dispute regarding the paint shop settlement that would allow them to prevail if proven at trial.

2. Outsourcing

Plaintiffs' second challenge is to a settlement of certain grievances arising from the Company's contracting certain work to outside contractors.[9]

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[9] Plaintiffs originally set forth additional claims. However, the briefs of the parties indicate that the two

In essence, Plaintiffs allege that there were grievances pending at the end of 1991 challenging this policy. The grievants claimed that this practice violated Article 38 of the collective bargaining agreement.

After Harry Smith became president of the Union, negotiations ensued to settle, inter alia, the outsourcing grievances. The Union and the Company reached an agreement that was approved by the Union's executive board in March, 1992, and by the full membership on March 26, 1992. Deposition of Richard Elliot at 53, lines 8-10; Exh. 7 to Defendants' Joint Statement of Material Facts.

The settlement called for the Company to pay a lump sum of $363,720 and for the Union to divide the money among the employees. Sanders Aff. at ¶ 26. The calculation employed by the Union in distributing the money was complicated and payments ranged from $75 to $3,700. Id. at ¶ 28. Notably, Harry Smith received

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discussed here are the ones Plaintiffs wish to pursue.

$75. Id. at ¶ 29.

a. Union Breach of Duty of Fair Representation

Plaintiffs assert three claims regarding the outsourcing settlement.

First, they claim

> [a]rguably, Union's acceptance of Company's outsourcing settlement offer of $363,720.00 sold the affected members short. However, it was the distribution of the settlement funds that represents clear proof of the arbitrary behavior in violation of Plaintiffs' rights.

(emphasis original). Certainly, a bare suggestion that the Union negotiators might have bargained for more money without any reference to evidence in the record can not even approach proving arbitrary or unreasonable conduct. See Findley, supra.

Second, Plaintiffs dispute the distribution of the

settlement funds. They complain that no effort was made to calculate which grievants would have worked overtime had the outsourcing not occurred. Defendants answer that there is significant movement of employees among various departments such that it would have been virtually impossible to accurately reconstruct who worked where and who would have received overtime during the period when work was outsourced. This explanation is wholly rational, especially coupled with the undisputed fact that the funds were widely distributed among employees (including Plaintiffs). In reality, then, Plaintiffs contend that they did not receive as much money as they believe they should have received. If true, it is unfair; it is not, however, "so far outside a 'wide range of reasonableness' as to be irrational or arbitrary." Painter, supra; see also, Findlay, supra.[10]

---

[10] Additionally, the undisputed fact that Harry Smith received the smallest possible distribution belies Plaintiffs' claim that he negotiated only to benefit himself.

Finally, Plaintiffs argue that the Union, as represented by Harry Smith, and the Company, as represented by plant manager Joseph Smith, negotiated the outsourcing settlement in one 30-45 minute meeting. This argument simply misconstrues the record. There is ample affidavit and deposition testimony that there were protracted negotiations between the Union and the Company and that the meeting referred to served merely to finalize the settlement. See Defendants' Joint Statement of Material Facts at ¶ 21-28 and testimony cited therein. Confronted with this evidence, Plaintiffs respond that they

> do not contend that other negotiations regarding the outsourcing grievances never occurred. Plaintiffs do contend and Defendants admit that the final agreement was arrived at in this final 45-minute closed door meeting. This is despite Defendant's continued contentions that Harry Smith was

> merely acting in his representative capacity as a member of the Shop Committee when he negotiated any of the grievances at issue in this case.
>
> This clearly shows that Harry Smith was the lead negotiator and that he was not afraid to deal with the Company one-on-one to resolve these grievances to his benefit.

Plaintiffs somehow place importance on the fact that the meeting between Joseph Smith and Harry Smith was one-on-one and behind closed doors. We do not find those details meaningful and we certainly do not agree that it raises any inference that Smith sought to benefit himself at the expense of other Union members. As noted, his part of the settlement was the smallest amount distributed.

Again, Plaintiffs have failed to demonstrate that the facts as they present them meet the high standard required to prevail in this hybrid § 301 case.

b. Company Breach of Collective Bargaining Agreement

In their briefs discussing the current motions, Plaintiffs seem to have abandoned the claim that the Company violated the collective bargaining agreement as related to the outsourcing settlement. The only such allegation seems to be in ¶ 77 of the complaint. That assertion of a breach of the collective bargaining agreement refers to the period before the settlement. As we noted, any breach there might have been was cured by the settlement, a fact that Plaintiffs do not contest. In short, then, Plaintiffs do not make a claim that the Company violated the collective bargaining agreement with regard to the outsourcing grievances and settlement.

III. Conclusion

In summary, although Plaintiffs recognize at least part of their burden in this case, they fail to demonstrate that the facts, even viewed in a light most favorable to

them, meet the well-established standard. Perhaps most important, Plaintiffs apparently do not realize that in a hybrid § 301 case, as this must be, their burden is to prove both that the Union breached its duty of fair representation and that the Company breached the collective bargaining agreement. Del Costello, supra.

Moreover, Plaintiffs attempt to draw inferences from the discovery produced in this case that reason and logic dictate are untenable. There are no material facts remaining in dispute that would allow Plaintiffs to prevail at trial.

We shall issue an appropriate order.

William W. Caldwell

United States District Judge

Date: July 28, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY FREELAND, et. al., :

Plaintiffs :

:

: 1:CV-92-1256

:

Harley Davidson, Inc., et. al. :

Defendants :

ORDER AND JUDGMENT

AND NOW, this 28th day of July, 1993, upon consideration of the motions for summary judgment filed by Plaintiffs; Defendant Harley Davidson, Inc.; and Defendant Tyson Lodge No. 175, District Lodge No. 98, International Association of Machinists and Aerospace

Workers, it is ordered that:

1. Plaintiffs' motion for summary judgment is **denied.**

2. The motions for summary judgment of Defendants Harley Davidson, Inc., and Tyson Lodge No. 175, District Lodge No. 98, International Association of Machinists and Aerospace Workers are **granted** and judgment is entered in their favor and against Plaintiffs.

3. The Clerk of Court shall close this file.

William W. Caldwell

United States District Judge

Filed: July 28, 1993

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

(2)

No. 94-291

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GREGORY FREELAND, *et al.*,

Petitioners,

v.

HARLEY-DAVIDSON, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in summarily affirming the United States District Court for the Middle District of Pennsylvania's dismissal of the action, where the Respondent Union did not breach its duty of fair representation in negotiating resolutions to a backlog of more than 1500 grievances?

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A. OVERVIEW

The 29 Petitioners challenge grievance settlements entered into between their employer, Respondent Harley-Davidson, Inc. ("the Company"), and their Union, Respondent Tyson Lodge No. 175, District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") during the first

half of 1992. These settlements, which were approved overwhelmingly at Union membership meetings, resolved over 1,500 grievances arising out of three disputes – (1) an attendance policy implemented by the Company in 1991; (2) the Company's outsourcing (subcontracting) of bargaining unit work; and (3) the staffing of a new paint shop in the Company's York, Pennsylvania plant.

As a result of these settlements, the Company rescinded the disputed attendance policy; paid members of the bargaining unit a total of $363,720 to resolve the outsourcing grievances; offered 58 bargaining unit members (including 15 Petitioners) promotions to positions in the new paint shop, and paid an aggregate backpay total of $122,643 to bargaining unit members (including 3 Petitioners) improperly denied paint shop promotions.

Petitioners do not challenge the lower court's finding that the settlements were rational, nor do they offer any suggestion as to how the Union could have settled these grievances in a fashion that would have satisfied all 29 Petitioners. *See* A. 21 n.7.[1] Rather, Petitioners contend that because Union President Harry Smith, a bargaining unit member affected by the disputes, benefited from these settlements, Smith's participation in the settlement discussions constitutes *per se* bad faith.

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[1] The unpublished opinion of the United States District Court for the Middle District of Pennsylvania granting Respondents' Motions for Summary Judgment is reproduced in the appendix to Petitioners' Petition for Writ of Certiorari ("Cert. Petition") and referred to herein as "A. ——."

B. THE GRIEVANCE SETTLEMENTS

1. Background

The employments of approximately 1,600 workers at the York plant are governed by a collective bargaining agreement ("Agreement"). Under the Agreement, the Union's Grievance Committee has primary responsibility for resolving grievances. The Grievance Committee consists of three elected Union officials, all of whom are employed by the Company in the bargaining unit – the Union's president, vice-president, and chief shop steward.

By the end of 1991, there were over 1,500 grievances pending. Labor relations between the Company and Union were strained; the amicable resolution of disputes was at a virtual standstill. The resulting grievance backlog was extremely disruptive to plant operations and employee morale.

In January, 1992, new union officers (including Smith, the new President) took office. The Company and the Union immediately began negotiating to resolve the major issues comprising the extraordinary grievance backlog. Attendance grievances were resolved first, followed by outsourcing grievances, and then paint line grievances.

2. Attendance Policy Settlement

In July, 1991, the Company implemented a new attendance policy because it thought that the existing policy was too lenient. By the end of 1991, there were over 1,000 pending grievances concerning the attendance policy.

Setting the stage for the resolution of even thornier disputes by the parties, in February, 1992, the Company agreed to withdraw the new policy and reinstate the

predecessor attendance policy. It also agreed to rescind all disciplinary actions under the new policy (unless the actions would have occurred under the old policy), and make restitution to all affected employees. The settlement represented total satisfaction of the Union's demands, and it was approved by the Union's membership at a regularly scheduled membership meeting.

3. Outsourcing Grievance Settlements

Under the Agreement, the Company can outsource work which cannot be performed at the facility due to a lack of space, equipment, and available personnel, providing the Company provides the Union with adequate advance notice. By early 1992, there were over 200 pending grievances concerning Company outsourcing from 1989 through 1991.

In early 1992, at the Union's request, the Company spent over 200 hours investigating each outsourcing grievances to determine: (1) the work areas from which the work was outsourced; (2) the value of the outsourced work; (3) the reasons for the outsourcing; and (4) whether notice had been provided to the Union. A matrix of this information was prepared and submitted to the Union. (The Union also tested the accuracy of the Company's information.) To settle the grievances, the Union insisted that the Company pay backpay at overtime rates on grievances where the Company had provided no notice, or where the Company had been capable of performing the outsourced work.

The Company accepted the Union's positions, which resulted in an agreement to settle the outsourcing grievances for $363,720. Additionally, the Company agreed

to: clarify the outsourcing notice mechanism; create more full-time bargaining unit jobs; and examine the feasibility of a skilled trade apprentice program. After the outsourcing settlement was reduced to a March 13, 1992 letter of understanding, the settlement was approved by the Union's executive board, and by vote of the Union's members at a regularly scheduled Union meeting on March 26, 1992.

The Union agreed to distribute the $363,720 among the bargaining unit. The Union's Grievance Committee, and Union counsel devised a uniform formula to distribute the settlement monies based upon how much work was outsourced from the three areas (tool and die, maintenance, and production) affected by the grievances.

Based upon the distribution formula, each production employee, including all 29 Petitioners *and* Union President Smith, received a payment of $75. Employees in other areas received various amonts that were considerably greater than $75.

4. New Paint Shop Settlement

After the attendance and outsourcing grievances were settled, the Company and the Union next negotiated a settlement of the paint shop grievances. These grievances arose in 1991, when the Company opened a new paint shop using computerized robotic equipment and electrostatic painting, to replace its existing shop. To staff the new paint shop, the Company established three new job classifications: automated application technicians ("AATs"), finesse technicians ("finesse techs"), and preparation technicians ("prep techs").

The Company prepared job descriptions and minimum requirements for each position. AATs, who would

operate the robotic painting systems, had to have "one year class A production painting experience" to qualify; if qualified, the bidder also had to pass written and practical tests. Applicants for the finesse tech and prep tech position also had to pass written and practical tests.

The Company posted 29 AAT positions for bid in April, 1991; over 120 employees submitted bids. Of the applicants allowed to take the written test (i.e., those with "Class A" painting experience), more than 29 employees passed the test; AAT positions were then awarded, as required by the Agreement, to the 29 most senior qualified employees.

After the AAT positions were filled, numerous grievances were filed by individual bargaining unit members, challenging various aspects of how the Company awarded the new paint shop positions. For example, almost all Petitioners who were denied an AAT promotion challenged the written test. Other employees, including Harry Smith and Petitioner Dawson, filed grievances because they were not permitted to test after the Company denied that they had sufficient "Class A" experience.[2] In a 1991 general grievance, the Union also alleged that the one year Class A experience requirement, and the written testing requirement, violated the Agreement. Thus, even prior to Smith's election as President,

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[2]These employees contended that the "Class A" requirement, which was designed to insure that applicants had certain minimum painting skills, was arbitrary. Indeed, Smith worked on the Company's "bomb line" (painting shell casings), operating the very paint booth the Company used to give the practical test to the AAT applicants. Moreover, it is undisputed that many employees held the Class A position for more than one year, but never actually painted.

the Union argued that the AAT positions should have been awarded solely on the basis of seniority, that the written testing requirement was arbitrary, and that the class A experience requirement abritrarily excluded senior, qualified employees throughout the bargaining unit from the AAT position.

In April, 1992, the parties agreed to settle the new paint shop grievance by: (1) eliminating the written test for the new paint line positions; (2) modifying the AAT "one year class A production painting experience" requirement to "one year production painting experience": (3) eliminating some job duties from the paint line job description; (4) awarding 45 AAT positions (i.e., the 29 original positions and sixteen additional positions); (5) agreeing that the 45 positions would be filled from the original list of bidders for the AAT job; *and* (6) awarding full backpay to all eligible employees, in accordance with a uniform backpay formula.

In calculating backpay, only those employees who suffered actual economic harm as a result of improperly being denied an AAT position in 1991 (i.e., those who were entitled to one of the original 29 AAT positions) were eligible for backpay as part of the settlement ("backpay eligible"). Employees in the 16 new positions available for the first time as part of the settlement were not eligible for back pay because they lost no monetary opportunities due to a previous "denial".

As to backpay eligible employees, their backpay was calculated by comparing their earnings in the position(s) they held after they were denied an AAT job, with what their earnings would have been in the AAT job. An employee who would have earned more as an AAT received the difference as backpay.

Consistent with the parties' long standing practice in promotion cases, refused overtime opportunities were considered as income for purposes of calculating backpay. (For example, if an employee actually earned $20,000, but refused $5,000 in overtime, the employee's total earnings were $25,000 for the purposes of calculating settlement backpay.) Similarly, the earnings of the AATs were increased by the amount of overtime the AATs refused.

After unanimous approval by the Union's Executive Board, the paint line settlement was overwhelmingly approved at a regularly scheduled Union membership meeting held on April 23, 1992. Contrary to Petitioners' unsupported assertions, *see* Cert. Petition at 10, the use of refused overtime in the backpay calculation was described at this meeting, a fact admitted by Petitioner King.

Thereafter, using this formula, the Company made payments to 8 senior, eligible employees who were awarded AAT positions. This group included Union President Smith, who received $18,241.87 (the second highest payment), and several Petitioners. *See* A. 22.

Numerous other Petitioners received AAT positions without backpay. In this regard, the old paint shop, where most Petitioners worked, had almost unlimited overtime opportunities, given the Company's needs during the transition to the new paint shop. Therefore, most of the Petitioners suffered little or no economic loss as a result of being denied the AAT job. Smith, however, worked in a part of the plant that had little overtime available, and thereby suffered substantially more economic loss.[3]

[3] Petitioners contend that Smith should have disclosed the amount of his backpay recovery at the April, 1992 Union meet- [footnote continued]

The Company used the same backpay formula for the finesse tech and prep tech positions. Using the original bid list, the Company promoted nine Petitioners to finesse tech, with or without backpay. Only Petitioners Smallwood and Ramos raised issues associated with the prep tech position; both were offered prep tech positions as part of the paint line settlement.

The Company considered the paint line settlement to be virtually complete capitulation. Indeed, the Company believed that the only concession it "won" in the settlement was the Union's agreement to fill AAT jobs from the original bid list, rather than having all the jobs posted for new bids. (This agreement was needed to avoid replacement of trained AATs, which would have made the paint line inoperable, and shut down the entire York plant.) Even so, the disruption in implementing the settlement was so minimal that only two AATs were reassigned to other jobs. These were two employees (Petitioners Haines and Elliot) who were awarded AAT jobs in the original bidding but who, under the settlement, were not among the 45 most senior qualified employees on the original bid list. Because Haines and Elliott did not have sufficient seniority, they were reassigned to other positions, consistent with the Agreement.

From the Union's perspective, the settlements accomplished every objective the Union had set out to achieve when it filed the grievances, without the time, risk or expense of arbitration. Indeed, given the District

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ing. In fact, neither the Company nor Union vice-President Gordon Spangler (who had been designated by the Union to review the Company's backpay calculations) disclosed individual backpay amounts to Smith or any other affected employee until after the Union membership meeting on April 23, 1992. *See* A. 21-22.

Court's finding, unchallenged by Petitioners, that the written test requirement did not violate the Agreement, *see* A. 26-28, many Petitioners received promotional opportunities from the settlement that may not have been attained in arbitration. Finally, and perhaps most important, the Company and the Union succeeded in resuscitating the labor-management relationship at Harley-Davidson, the stagnation of which had literally threatened to paralyze the York operation.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari fails to raise any novel or important issue of federal law which necessitates the exercise of this Court's discretionary jurisdiction. Further, the District Court properly dismissed this action below, because Petitioners failed to prove that the Union violated its duty of fair representation in negotiating the resolution to more than 1500 pending grievances. The grievance settlements were necessary, fair and rational resolutions of contentious issues that threatened both plant operation and labor-management relations. Moreover, the Union's elected officers, who are themselves working bargaining unit members, discharged their representation duties in complete good faith by negotiating the grievance settlements, which were subsequently approved by the Union's membership.

ARGUMENT

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The summary affirmance by the Third Circuit Court of Appeals of the District Court's grant of summary judgment to Respondents conflicts with neither the decisions of this Court, nor the decision of any other

court of appeals. Nor does this case raise any novel or important issues of federal law which need be settled by this Court. Rather, Petitioners merely entreat this Court to introduce disruption and upheaval to industrial relations, in place of the certitide and stability which have long propelled federal labor law.

The District Court below correctly applied the standard for evaluating a union's representation of its bargaining unit members that this Court first enunciated almost thirty years ago in *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916 (1967): A union breaches its duty of fair representation only if its actions are "arbitrary, discriminatory, or in bad faith."[4] As this Court elaborated in *Airline Pilots Association v. O'Neill,* 409 U.S. 65, 111 S.Ct. 1127 (1991), whether a union has acted arbitrarily calls for an objective evaluation of whether, "in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a 'wide range of reasonableness,' . . . as to be irrational." 499 U.S. at ___ , 111 S.Ct. at 1130 (citation omitted).

It is axiomatic that a claim that a union has acted in "bad faith" must be *proven* by the party challenging the Union's conduct. *Ackley v. Local Union 337, Team-*

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[4]Preliminary, although the Union resolved over fifteen hundred grievances in several contentious areas, Petitioners appear to request that this Court review only the settlement of the Paint Shop grievances. However, Petitioners do not challenge the District Court's finding that the Company did not breach the Agreement in imposing a written testing requirement. As such, Petitioners have failed to prove one of the two essential elements of a hybrid duty of fair representation case. *See Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91 (1983). Under these circumstances, the instant case was properly dismissed, regardless of the propriety of the Union's conduct.

sters, 910 F.2d 1295, 1307-08 (1990) (Nelson, J., dissenting), *rev'd,* 948 F.2d 267 (6th Cir. 1991) (adopting reasoning of dissenting opinion of Nelson, J., in light of *O'Neill*); *Schmidt v. IBEW, Local 949,* 980 F.2d 1167, 1171 (8th Cir. 1992). In the instant case, the District Court firmly rejected Petitioners' contention that the Union "designed" the settlement of the Paint Shop grievances to benefit Union President Smith, at the expense of other bargaining unit members:

> [Petitioners] imply that the [Paint Shop backpay] equation was established to insure that Harry Smith received a large sum. We note, first, that there is no indication in the record that [Petitioners'] accusation is true.

A. 22. The District Court further found that this allegation, like others leveled by Petitioners against the Union, was based upon Petitioners' "attempt to draw inferences from the discovery produced in this case that reason and logic dictate are untenable." A. 22-23, 35.

Having failed to prove either that the settlements were unreasonable, or that the Union acted in bad faith, Petitioners now argue that this Court should rewrite the face of federal labor relations, and find that union officials are subject to conflict of interest principles applicable to common law trust fiduciaries. *See* Cert. Petition at 14.

The theory that union officials acting in their elected, *representative* capacity must, as a matter of law, disqualify themselves, or otherwise obtain the "consent"of individual bargaining unit members, whenever they have some arguable interest in the outcome of a grievance is absurd and without any foundation in federal law.

Beyond a doubt, such a requirement would decimate industrial self-government, which is the underlying purpose of unionization. As the Ninth Circuit recognized in *Barthelemy v. Air Line Pilots Association,* 897 F.2d 999, 1005 (9th Cir. 1990), "a primary purpose of having elected union officials is to make sure their personal interests align with those of other members." Thus, unlike a common law fiduciary, a union official is believed to be a more effective representative when he or she is personally affected by the outcome of grievances.

Moreover, unions are often faced reconciling the conflicting claims of bargaining unit members. Under such circumstances, this Court has admonished against "neutraliz[ing]" unions when "the issue is chiefly between two sets of employees." *Humphrey v. Moore,* 375 U.S. 335, 349-50, 84 S.Ct. 363, 372 (1964); *see also Ratkosky v. United Transportation Union,* 843 F.2d 869, 878-79 (6th Cir. 1988) (minority group adversely affected by union action does not establish hostility); *Berrigan v. Greyhound Lines, Inc.,* 782 F.2d 295, 298 (1st Cir. 1986) (employees cannot insist that the union ignore the legitimate interests of other members).

In this case, the Petitioners themselves present conflicting claims, where resolution in favor of some would work against others. *See* A. 21 n.7. Not surprisingly, Petitioners do not explain how the Union's officials should have sought "consent" from the bargaining unit to discharge their duties, or from whom such "consent" should have been sought.

In fact, under federal law, the "consent" for the Union's officers to discharge their duties under the Union's by-laws is given by ballot, when the membership as a whole elect its representatives. Petitioners

now in effect contend that they should have "veto" power over the representation functions of the Union's elected officers in resolving grievances, notwithstanding the mandate of the membership as a whole. It is hard to posit a requirement that would be more disruptive to stable industrial relations than a union's president, on a case-by-case basis, needing to seek the permission of various factions within a bargaining unit to resolve a dispute, simply because the representative's employment as a bargaining unit member is also affected.

Indeed, contrary to Petitioners' claim, this case does not even present an actual conflict of interest between the Union President and Petitioners. As Petitioners concede, to prevail on their grievances, and for Smith to obtain a position based on seniority, the written testing requirement had to be eliminated. Thus, not only did Petitioners' interests "align" with Smith's, *see Barthelemy,* 897 F.2d at 1005, Petitioners benefited when the Union successfully negotiated elimination of the test requirement. Similarly, Smith's interest in modifying the "Class A" experience requirement, which several Petitioners acknowledge to be irrational, mirrored that of Petitioner Dawson, as well as many other individuals throughout the bargaining unit who were arbitrarily excluded from qualifying for the AAT position.

Finally, although Petitioners complain that they should have received more money from the paint line settlement, because "refused overtime" should not have been a factor in backpay calculations, there is not a scintilla of credible evidence to dispute the fact that "refused overtime" is always a variable in promotional backpay determinations. Likewise, Petitioners articulate no basis whatsoever for how this use of refused overtime violates the Agreement. Indeed, there was no

resolution to the paint line dispute that could have been more equitably implemented, vis-a-vis 120 employees who sought the 29 AAT jobs.

It is well established that federal courts do not sit to "second guess" the outcomes of employer-union negotiations. *Peterson v. Kennedy,* 771 F.2d 1244, 1254 (9th Cir. 1985) ("[i]t is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued"). Indeed, the federal courts have correctly expressed concern that needless and protracted lawsuits such as this over union's good faith grievance resolutions may "drive some unions out of existence or otherwise damage the collective bargaining process." *Ackley,* 910 F.2d at 1308; *see also Herring v. Delta Air Lines, Inc.,* 894 F.2d 1020, 1023 (9th Cir.), *cert. denied,* 494 U.S. 1016, 110 S.Ct. 1319 (1990) (union "must be able to focus on the needs of its whole membership without undue fear of law suits from individual members").

The Courts below properly rejected Petitioners' desire to elevate their self interests over Federal law and their bargaining unit as a whole. The District Court's dismissal of Petitioners' claims fully conforms with the prior decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, the Respondent Union requests that the Petition for Writ of Certiorari be denied.

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